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IN THE

Supreme Court of the United States

October Term, 1969

No. 993

THOMAS PICCINI,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The above-named petitioner respectfully prays this Court for a writ of certiorari to the United States Court of Appeals for the Second Circuit as follows:

A.

Opinion Below

The United States Court of Appeals for the Second Circuit by judgment entered on June 27, 1969, unanimously affirmed a judgment in the United States District Court for the Eastern District of New York convicting petitioner and

others of fraudulent concealment of assets in contemplation of bankruptcy in violation of Title 18, Section 152, United States Code, and of conspiracy so to do, in violation of Title 18, Section 371, United States Code, after trial by jury before Honorable Jack Weinstein, a Judge of said Court.

The opinion of the United States Court of Appeals for the Second Circuit is set forth in Appendix A hereof.

There were no other opinions written in connection with the case.

B.

The Grounds on Which the Jurisdiction of This Court Is Invoked

Jurisdiction of this Court is invoked under Title 28, Section 1254, subdivision 1 of the United States Code, and under Rule 19, subdivision 1 of the Rules of this Court.

The judgment sought to be reviewed herein is the judgment of the United States Court of Appeals for the Second Circuit entered on June 27, 1969, as aforesaid.

C.

The Question Presented for Review

Did the receipt by the Grand Jury of the compelled testimony of petitioner, as previously given by him under the compulsion of Title 11, Section 25, United States Code at the first Meeting of Creditors in the Bankruptcy Court, preclude his prosecution under this indictment?

D.

Constitutional Provisions and Statutes Involved

(1) The constitutional provision involved is the self-incrimination clause of the Fifth Amendment to the United States Constitution.

(2) The statutes involved are Section 25 of Title 11, United States Code, and Sections 371 and 152 of Title 18, United States Code.

Each of the foregoing is set forth in Appendix B of this petition.

E.

A Concise Statement of the Case and the Material Facts Pertaining to Consideration of the Questions Presented

(1) *Statement of the Case*

Appellant was indicted in the United States District Court for the Eastern District of New York under Indictment No. 64 CR 273. Also named as defendants were Frank Monda and Sheldon Brander (officers and stockholders with appellant in the bankrupt Vanderbilt Tobacco and Candy Co., Inc.) and Ralph Di Budno (a truckdriver employee of the bankrupt) and Harold Surofsky (a salesman employed by the bankrupt).

The indictment charged all defendants jointly with three substantive counts of fraudulent concealment of the bankrupt's assets (counts 1, 2 and 3) in violation of 18 U.S.C. §152 and with conspiracy to do so in violation of 18 U.S.C.

§371 and 2 (count 4). In addition, there were various counts of perjury alleged against Piccini, Monda and Brander arising from their testimony before the Referee in the bankruptcy proceedings. The perjury counts as to Piccini and Brander were severed during trial upon their application. Monda did not seek a severance and proceeded with the trial on all counts alleged against him.

Trial commenced in the Eastern District of New York before Hon. Jack Weinstein and a jury on April 2, 1968 and ended with the jury's verdict on May 2, 1968.

The trial court submitted to the Jury only counts 3 and 4 against all defendants. These counts charge concealment of the bankrupt's assets in contemplation of bankruptcy (count 3) and conspiracy (count 4). He also submitted to the jury the two perjury counts alleged against Monda.

By their verdict, the jury acquitted defendants Di Budno and Surofsky on all counts. The jury convicted appellant Piccini and defendants Monda and Brander under counts 3 and 4 and also convicted Monda of one count of perjury and acquitted him as to the other.

On June 21, 1968, Judge Weinstein sentenced appellant Piccini to a prison term of three (3) years. Monda received a prison sentence of six (6) months and Brander received a prison sentence of three (3) months. Bail was continued for all pending appeal to the Court of Appeals.

All convicted defendants, including appellant, filed timely notices of appeal. Subsequently, Monda and Brander withdrew their appeals, thus leaving Piccini as the sole remaining party to the appeal.

(2) *Material Facts Pertinent to the Issue Presented*

The case as finally submitted by the Court to the jury as against petitioner consisted of two counts of the original indictment, viz. Count Three, charged concealment of assets in contemplation of bankruptcy (18 U.S.C. §152) and Count Four, charging conspiracy (18 U.S.C. §371). Petitioner was convicted of both counts.

During the pendency of the bankruptcy proceedings on the involuntary petition filed against Vanderbilt, petitioner was subpoenaed by the Trustee through his counsel, Robert Herzog, to attend the first meeting of creditors. Petitioner complied with the subpoena and gave testimony respecting his participation in the affairs of Vanderbilt.

Subsequently, when the Grand Jury commenced hearing the evidence upon which they ultimately indicted petitioner and the co-defendants, Herzog was called as a witness before that Grand Jury. His Grand Jury testimony on July 9, 1964 was received in evidence upon the instant trial as Court's Exhibit 2 in connection with petitioner's motion to dismiss counts 1, 2, 3 and 4 of the indictment.

From this Grand Jury testimony (Court's Exhibit 2) it appears that Herzog subpoenaed Piccini and others to testify at the adjourned first meeting of creditors held on November 28, 1962 (Grand Jury Testimony of Herzog, Pages 9 and 12 thereof).

Piccini's transcribed testimony before the Referee at this first meeting of creditors was received in evidence before the Grand Jury during Herzog's testimony as Grand Jury Exhibit 5. (Grand Jury Testimony of Herzog, Page 10, thereof.) Herzog described the transcript of Piccini's testimony (Grand Jury Exhibit 5) as follows on Pages 12-13 of his (Herzog's) Grand Jury testimony.

"Grand Jury Exhibit 5 is what is known as the Adjourned First Meeting. In order that the jurors might understand, the First Meeting of Creditors, wherein the trustee is elected, for judicial purposes of the Bankruptcy Act is usually adjourned from time to time. The Bankruptcy Act requires the principals to appear also. The principals of the corporation are in fact the corporation under the Bankruptcy Act. They must attend the first meeting. So the Adjourned First Meeting was under that provision, whereas the other examinations I testified to were specific inquiries against persons who may have just done business with the corporation.

Under this Adjourned First Meeting examination, which was held on November 28th before the referee in bankruptcy, I at that time examined Frank Monda, Sheldon Brander and Thomas Piccini. That's as contrasted with the 21A examination."

The aforesaid transcript of Piccini's testimony on November 28, 1962 (Pages 30-33 thereof) pursuant to subpoena before the Referee at the First Meeting of Creditors was received in evidence by the trial Court as Court's Exhibit 6 in connection with Piccini's motion aforesaid to dismiss Counts 1, 2, 3 and 4. At this first creditor's meeting, Piccini answered at length questions with respect to his participation in Vanderbilt's business affairs and his connection with its assets.

That motion to dismiss upon the ground that 11 U.S.C. 25 prohibits use of such testimony in a criminal proceeding was denied.

F.

Basis for Jurisdiction in the United States District Court

The jurisdiction of the United States District Court for the Eastern District of New York was invoked upon the ground that the crimes charged were violations of Federal law, to wit: 18 U.S.C. §152 and 18 U.S.C. §371, allegedly committed within the Eastern District of New York.

G.

Argument Amplifying the Reasons Relied on for the Allowance of the Writ

POINT ONE

The receipt by the Grand Jury of the testimony of appellant Piccini, given at the first meeting of creditors in the bankruptcy court under the compulsion of Title 11 U.S.C. §25, precluded his prosecution under the first four counts of this indictment.

Title 11 U.S.C. §25 provides, in pertinent part as follows:

> "The bankrupt shall (1) attend the first meeting of creditors, if directed by the Court or a judge thereof to do so . . . and (9) when present at the first meeting of creditors; and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind and whereabouts of his prop-

erty, and, in addition, all matters which may affect the administration and settlement of his estate; BUT NO TESTIMONY GIVEN BY HIM SHALL BE OFFERED AGAINST HIM IN ANY CRIMINAL PROCEEDING."

It is our contention that by reason of the quoted section, petitioner was protected against the instant prosecution under the first four counts of the indictment.

We commence our analysis by noting that the Bankruptcy Act includes among its basic purposes the protection of creditors who have an interest in the bankruptcy estate. It is equally obvious that Congress, in enacting Section 25 must be deemed to have had in mind the Fifth Amendment and its possible proper use by a bankrupt if his examination under oath were to be compelled. Since one of the purposes of the bankruptcy proceedings is to discover assets which might be turned over to the creditors, it was apparent that the invocation by the bankrupt of his Fifth Amendment privilege would impede the carrying out of this vital purpose. Thus, the statutory scheme outlined in Section 25 (and in Section 44 which is to be read in conjunction with it [*Cameron* v. *U.S.*, 34 S. Ct. 244, 231 U.S. 710]) was devised by Congress.

Its plain function was to assure a bankrupt that he need not fear prosecution for his conduct of the business by virtue of giving testimony which Congress sought for the benefit of creditors. Hence the simple and unequivocal command of the statute. Defendants' testimony must be regarded as having been given by them in reliance upon the presumably protective language of Section 25. See *In re Naletsky,* 280 F. 437 (D.C. Conn., 1921) holding that

a referee should caution the witness as to his constitutional rights.

In *U. S.* v. *Salih,* 287 F. 763, an indictment predicated upon testimony of the bankrupt given under Section 7 of the Bankruptcy Act (11 U.S.C. §25) was dismissed. The Court held at Page 282:

> "The proposition that the protection afforded a bankrupt who submitted to examination under section 7(9) extends to the use of his testimony before a grand jury would seem to have the support of the authorities as well as of sound reasoning. It follows that the evidence upon which the indictment was returned was improperly before the grand jury, and the use of it infringed the defendant's rights secured to him by the laws of the United States, if indeed the use did not encroach upon his constitutional rights. United States v. Silverthorne (D.C.), 265 Fed. 853; Cooper v. United States, 247 Fed. 45, 159 C.C.A. 263; Arndstein v. McCarthy, 254 U.S. 71, 41 Sup. Ct. 26, 65 L. Ed. 138.
>
> Defendant's motion to quash is allowed." (See also *U. S.* v. *Lawson,* 255 F. Supp. 261.)

In *Ensign* v. *Pennsylvania,* 33 S. Ct. 321, 227 U.S. 592, the Court held that written bankruptcy schedules were not included under the protective ambit of Section 25 as contrasted with oral testimony which was protected.

In *Burrell* v. *Montana,* 24 S. Ct. 787, 194 U.S. 572, 578 the Court noted that while Section 25 does not render the bankrupt transactionally immune from prosecution as a result of his testimony, nonetheless "in case of prosecution his testimony cannot be used against him."

In *Jacobs* v. *U. S.*, 161 F. 694 (C.C.A. Mass. 1908) a conviction was reversed upon the ground that the prosecution violated Section 25 by making use of the defendant's testimony on cross-examination of the defendant.

Further support for our position is found in *U. S.* v. *Castellana,* 349 Fd. 2d 264, C.A.N.Y. 1965, *cert. den.* 86 S. Ct. 935, 383 U.S. 928, holding that where the bankrupt is a corporation, the "immunity" under Section 25 applies in those situations where "the director or shareholder is specifically designated to perform the bankrupt's duties." Included among those duties commanded by Section 25 are to "attend at the first meeting of creditors" (§25 (a)(10)). These duties the petitioner carried out. He was an officer and stockholder of Vanderbilt.

It would, therefore, appear that when an officer of a bankrupt corporation testifies, pursuant to Section 25, at the First Meeting of Creditors, and gives testimony as to his acts with respect to assets of the bankrupt corporation his testimony may not constitutionally "be offered in evidence against him in any criminal proceeding." A grand jury inquiry is a criminal proceeding (*Counselman* v. *Hitchcock,* 12 Sup. Ct. 195, 142 U.S. 547). In this view of the circumstances at bar, counts 3 and 4 should have been dismissed as a matter of law. To allow the use of the testimony would be to rewrite Section 25 so as to make of it not what it says but what it expressly refuses to say.

CONCLUSION

The petition should be granted and this Court, in the exercise of its powers, should order that the judgment of conviction be reversed and the indictment dismissed.

Respectfully submitted,

EVSEROFF, NEWMAN & SONENSHINE
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Of Counsel

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 512—September Term, 1968.

(Argued April 15, 1969 Decided June 27, 1969.)

Docket No. 32625

UNITED STATES OF AMERICA,

Appellee,

—v.—

THOMAS PICCINI,

Appellant.

Before:

WATERMAN, SMITH and FEINBERG,

Circuit Judges.

Appeal from a judgment of conviction entered after jury trial in the United States District Court for the Eastern District of New York, Jack B. Weinstein, *Judge,* for fraudulent concealment of a bankrupt's assets and conspiracy in violation of 18 U.S.C. §§152, 371.

Affirmed.

WILLIAM SONENSHINE, New York, N. Y., *for appellant.*

VINCENT T. MCCARTHY, United States Attorney, Eastern District of New York (Louis R. Rosenthal, Asst. U. S. Attorney, on the brief), *for appellee.*

SMITH, *Circuit Judge*:

The defendant, Thomas Piccini, was one of five co-defendants[1] charged with knowingly and fraudulently concealing the assets of a bankrupt in violation of 18 U.S.C. §§152, 371. He was convicted on both the substantive and conspiracy counts after jury trial before Judge Weinstein in the United States District Court for the Eastern District of New York, and sentenced to three years in jail.

On appeal the defendant challenges the sufficiency of the evidence, as well as the admissibility of certain testimony given at trial by his former attorney. He also argues that the grand jury indictment was defective because it was based on statements allegedly inadmissible under section 7a(10) of the Bankruptcy Act, 11 U.S.C. §25(a)(10). We find no error and affirm.

The evidence, even though largely circumstantial, was plainly sufficient. In April, 1962, Piccini invested in a New York corporation, Vanderbilt Candy and Tobacco Co., Inc. ("Vanderbilt"), a tobacco and candy distributor. Shortly thereafter Vanderbilt embarked on the classic course of bankruptcy fraud, greatly expanding its purchases on credit and selling at or below cost for cash or checks to cash which promptly disappeared, with Vanderbilt's involuntary bankruptcy following in due course.[2] As to Piccini's actual participation in the fraud scheme, the prosecution showed that Piccini had greatly exaggerated the amount of his investment in the company in order

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1 Two of the co-defendants, DiBudno and Surofsky, were acquitted on all counts. The other two co-defendants, Brander and Monda, were convicted on the same counts as Piccini, and in addition Monda was convicted on a perjury count. Piccini, however, is the only co-defendant who elected to take an appeal.

2 Cf. *Kaplan* v. *United States*, 7 F. 2d 594 (2d Cir.), cert. denied 269 U.S. 582 (1925).

to inflate its capital stock and construct a favorable financial statement for credit purposes. Shortly after he joined Vanderbilt, the defendant brought a friend, Harold Surofsky, into the company as a salesman, and Surofsky promptly began disposing of large quantities of merchandise at sacrifice prices. There was also the unexplained disappearance of Vanderbilt's books and records, the non-deposit of checks and cash in Vanderbilt's bank account, and the spectacle of merchandise trucked away immediately upon delivery. The jury could also have found that Piccini received some of the cash which the company had been unable to account for. Moreover, the participation of his two partners, Brander and Monda, in the scheme was fully established. The evidence was ample therefore on both the substantive and conspiracy counts.

The defendant urges next that the court erred in allowing Theodore Rosenberg, attorney for Vanderbilt, to testify that Piccini owed him money for past legal services, and that Piccini had instructed him to apply the proceeds of certain corporate claims in partial reduction of this personal indebtedness. Piccini insists that these statements were made in the attorney-client context and are therefore privileged. The instruction claimed to be privileged, however, was given by Piccini as an officer of the corporation, so that the privilege, if any, was that of the corporation, and may not be availed of by Piccini.[3]

The defendant's principal claim appears to be that his testimony in bankruptcy proceedings was privileged and that its use against him invalidates the conviction.[4] The

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3 See Govt's Ex. 36, a letter signed by Piccini for the corporation.

4 11 U.S.C. §25(a)(10) provides that:

> The bankrupt shall . . . at the first meeting of his creditors, at the hearing upon objections, if any, to his discharge and at such other times as the court shall order, submit to an examination concerning

testimony was not allowed in evidence at trial, but was before the grand jury. If the indictment were based solely on that testimony, it might be that we would have to determine whether the court abused its discretion in denying the motion to dismiss counts 1, 2, 3 and 4 and to decide whether the privilege extends to an officer of a bankrupt corporation who is subpoenaed to testify at the first meeting of creditors.[5]

We need not resolve this question, however, since the testimony given at the creditors' meeting was excluded from evidence at trial, and since the indictment returned by the grand jury was not based solely on the questioned testimony. Indeed, some thirty witnesses testified before the grand jury and detailed the situation portrayed on

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the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate or the granting of his discharge; *but no testimony given by him shall be offered in evidence against him in any criminal proceedings, except such testimony as may be given by him in the hearing upon objections to his discharge*. . . . [Italics added.]

5 The competing considerations are set out in the majority and dissenting opinions in *United States* v. *Castellana*, 349 F. 2d 264 (2d Cir. 1965). For the majority, Judge Kaufman stated that the section 7(a)(10) privilege applies only when the officer of a bankrupt corporation has been "designated by the [bankruptcy] court" to perform the bankrupt's duties. "[A] meaningful distinction . . . should be drawn between the corporate officer who testifies voluntarily, and thus cannot claim the privilege, and the one who, having been *directed* to appear by the bankruptcy court, has thereby been 'designated by the court [to] perform the duties imposed upon the bankrupt by this title.'" *Id.* at 273. In his dissent, Judge Hays suggested that the privilege should not depend on "technical" concepts of corporate identity, since the purpose of section 7(a)(10) was "to encourage corporate officers, directors and shareholders to testify freely and fully as to the pre-bankruptcy corporate activities." *Id.* at 278. *Cf. United States* v. *Weissman*, 219 F. 2d 837, 841 (2d Cir. 1955), where Judge Learned Hand observed that the section 7(a)(10) privilege was "obviously for the purpose of insuring a full disclosure of the facts."

trial.[6] We will not upset a conviction founded on an indictment based on sufficient, legal and probative evidence because other evidence of doubtful admissibility was also before the grand jury. See *Lawn* v. *United States*, 355 U.S. 339, 349 (1958); *Holt* v. *United States*, 218 U.S. 245, 247 (1910); *United States* v. *Jordan*, 399 F. 2d 610, 615 (2d Cir. 1968); *United States* v. *Tane*, 329 F. 2d 848, 853-854 (2d Cir. 1964).

Since the indictment was based on other sufficient competent evidence and the statements obtained in the bankruptcy proceedings were not admitted in evidence before the trial jury, we conclude that the conviction may stand. The judgment is affirmed.

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6 Court Exhibits 2, 3, 4, 5, 6, 7, 8 and 10, for instance, were part of the grand jury testimony, and see references to unquestioned testimony before the grand jury at R. 473ff, 591ff, 743, 747, 777, 814, 1234-9, 1523ff, 1628, 2281, 2478, 2523ff, 2590-1.

APPENDIX B

AMENDMENT V TO THE UNITED STATES CONSTITUTION

"* * * nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law * * *."

TITLE 11, §25 UNITED STATES CODE

§25. Duties of bankrupts

"(a) The bankrupt shall (1) attend at the first meeting of his creditors, at the hearing upon objections, if any, to his application for a discharge and at such other times as the court shall order; * * * (10) at the first meeting of his creditors, at the hearing upon objections, if any, to his discharge and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate or the granting of his discharge; but no testimony given by him shall be offered in evidence against him in any criminal proceeding, except such testimony as may be given by him in the hearing upon objections to his discharge: * * *"

TITLE 18, §152 UNITED STATES CODE

§152. Concealment of assets; false oaths and claims; bribery * * *

"Whoever, either individually or as an agent or officer of any person or corporation, in contemplation of a bankruptcy proceeding by or against him or any other person or corporation, or with intent to defeat the bankruptcy law, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation; or * * *

Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

TITLE 18, §371 UNITED STATES CODE

§371. Conspiracy to commit offense or to defraud United States

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. * * *"